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Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Church of Scientology of California ("the Church") respectfully submits this reply brief in further support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. The government expressly concedes that there is a conflict in the circuits "on the precise narrow issue presented here" -- whether an appeal is moot following disinterested third party compliance with an order enforcing an IRS summons. Brief in Opposition at 10 n.7 (hereinafter "Opp. at ___"); *id.* at 12-13; *compare Gluck* v. *United States*, 771 F.2d 750, 754 & n.3 (3d Cir. 1985), with the decision below, Appendix to Petition at 1a-2a (hereinafter "Pet. App. at ___"); *see*

Petition at 14-15. On this important question of the administration of the federal tax laws and the justiciability of appeals from district court orders enforcing government summonses and subpoenas, this concession alone is a sufficient ground for granting the petition. Sup. Ct. Rule 10.1(a).[1/]

The government's attempts to belittle this direct conflict on the precise and important issue presented here are without merit. Relying upon a dissent in *Gluck*, the government argues that the Third Circuit should "be given an opportunity to reconsider en banc" its position that compliance with an IRS summons does not moot an appeal. Opp. at 13. The government, however, ignores the fact that *Gluck* acknowledged the contrary decisions in other circuits, 771 F.2d at 754 n.3, and explicitly distinguished the earlier case upon which the government relies. *Id.* at 753-54 (discussing *Vesco* v. *SEC*, 462 F.2d 1350 (3d Cir. 1972)); Pet. at 19 n.7. Contrary to the government's suggestion, Opp. at 13, there have been no post-*Gluck* decisions that provide new or more compelling rationales than the pre-*Gluck* decisions that have held appeals moot in the circumstances presented here. *See* Opp. at 7-8. Indeed, in *dictum* in a previous case, the Ninth Circuit essentially agreed with *Gluck's* position concerning *disinterested* third party compliance. *See United States* v. *Kersting*, 891 F.2d 1407, 1411 n.9 (9th Cir. 1989), *cert. denied*, ___U.S.___, 111 S.Ct. 49 (1990). The government provides no reason to

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1/ Inexplicably, the government claims that petitioner denies that decisions which hold that compliance with a summons enforcement order moots an appeal involve instances of disinterested third party compliance. To the contrary, this petition is predicated precisely on this conflict between the Third Circuit and other circuits. *See* Pet. at 15 ("The court in *Gluck* noted that its 'holding perpetuates the conflict between this court and most other courts of appeals that have considered the issue.' [771 F.2d] at 754 n.3.").

believe that the Third Circuit would or should reconsider its decision.

Moreover, although *Gluck* is the only court to *hold* as it has on the precise issue presented here, at least three circuits have indicated in *dicta* that they would agree with *Gluck* in cases involving disinterested third party compliance. *See United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 723-24 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States* v. *Kis*, 658 F.2d 526, 534 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Kersting, supra*, 891 F.2d at 1411 n.9; *see also Gluck*, 771 F.2d at 754 n.3; Pet. at 15-17. The government is correct that both *Arthur Anderson* and *Kersting* involved *interested* third parties, Opp. at 12 (*Kis* involved compliance by the taxpayers themselves, 658 F.2d at 533) , but it ignores the fact that these courts explicitly distinguish between compliance by disinterested and interested parties for purposes of mootness analysis. *See* Pet. at 15-18 (discussing cases). The government's conclusory assertion that whether compliance is by the taxpayer or by a disinterested third party is irrelevant to the question of mootness, Opp. at 11, ignores the distinction recognized by these cases, including that, unlike a taxpayer who has voluntarily complied with a summons enforcement order rather than risk contempt, a taxpayer who has no control over a disinterested third party's decision to turn over documents continues to have an adverse legal interest against the government concerning a definite and concrete live controversy. Pet. at 18-19.

Thus, regardless of *Gluck's* minority status, this Court should resolve the conflict in the circuits and adopt the holding in *Gluck* that compliance by a disinterested third party with a summons enforcement order does not moot an appeal, for the reasons stated in the petition; *see also* Point II, *infra*.

II. The government ignores the fundamental, well-settled principle that an appeal is not moot when "any effectual

relief" remains available to the appealing party. *Mills* v. *Green*, 159 U.S. 651, 653 (1895); Pet. at 10. Effective relief is available to the Church here by way of an order that the tapes and any documents derived from the tapes be returned to the custody and control of the district court and that any information derived therefrom not be further disclosed to any other persons or otherwise used by the IRS, which would effectively return the parties to the *status quo ante*. *See United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 422 n.6 (1983); *Gluck*, 771 F.2d at 753-54; Pet. at 11-15 (discussing cases). Because such effective relief is readily available should the Church prevail on its appeal from the district court's order, a decision by the court of appeals would not be an advisory opinion, but would resolve a "definite and concrete" "controversy between . . . parties" that retain "adverse legal interests" on the relevant issues. *See DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (internal quotations omitted); Pet. at 11-12, 17-19.

In response to the obvious availability of this effective relief, the government disingenuously asserts that "a decision reversing an enforcement order could not alter the fact that the records have been produced and could not erase the knowledge obtained from those records." Opp. at 8. The government, however, carefully avoids any mention of the fact that *twice* previously in this case the IRS has obtained access to the tapes following erroneous court orders, and both times the district court ordered the tapes and any notes or copies of the tapes returned to its custody and control. Pet. at 3, 5-6, 12, 19 n.7; Pet.App. 8a, 47a-49a. On neither occasion did the government or the lower courts suggest that this court-authorized IRS access to the tapes rendered the case moot or that return of the tapes did not constitute "effectual relief" merely because one could hypothesize various ways in which the *status quo ante* was not precisely restored. The government, by its studied silence on this issue, effectively concedes that there is no principled reason why such relief, effective

twice previously in this very case, would not constitute "effectual relief" now.

The government also misconstrues this Court's decision in *Sells, supra*, in an attempt to create a nonexistent distinction between that decision and the instant matter. The appeal in *Sells* did not involve "allegations of impropriety in the [government's] disclosure of grand jury materials" or improper future violations of grand jury secrecy. Opp. at 10-11. In *Sells*, as here, the government properly sought and obtained a district court order *before* the grand jury material was disclosed to Civil Division attorneys. 463 U.S. at 421-22. The appeal from that order did not allege that the disclosures violated the district court's order, but rather that the order erroneously permitted Civil Division attorneys to obtain the documents. *Id.* at 422. As in *Sells*, the issue here is whether the district court erroneously ordered documents turned over to certain government officials and, if so, what shall be the remedy. The simple truth is that there is no relevant distinction between *Sells* and the instant case on the mootness issue, including the availability of effective relief. The government's resort to the fiction that *Sells* involved a challenge to government improprieties, rather than an appeal of an erroneous district court order, only serves to highlight that *Sells* directly controls resolution of the instant matter.

Underlying the government's opposition is the incorrect assumption that a taxpayer suffers no harm when a district court erroneously orders a disinterested third party to deliver documents to the IRS and the IRS then obtains the documents. Opp. at 8-11. Based on this incorrect view, the government contends that any possible harm to the taxpayer can be cured by a suppression hearing at some future date should the government proceed against the taxpayer, and that any earlier ruling cannot possibly affect the interests of the taxpayer. Congress, however, rejected this view when it enacted legislation in 1976 to permit a taxpayer challenge to

an IRS summons directed at a disinterested third party. *See* 26 U.S.C. § 7609. This legislation recognizes that the taxpayer may suffer substantial harm when the IRS has improper or unlawful access to the citizen's private papers; when it discloses them to other individuals; when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer; and when it brings a criminal or civil tax proceeding dependent on improperly obtained and ultimately suppressed documents.

Indeed, if the government's view were correct, then there would be no reason to permit any taxpayer challenge to a third-party summons. The IRS would issue the summons and the disinterested party would be required to produce the documents. Any challenge would have to await some future proceeding in which the IRS sought to admit the documents against the taxpayer. Certainly, a district court order -- whether or not erroneous -- that a summons to a disinterested party should be enforced is no more "advisory" or "speculative" than an appellate court ruling on this issue. Pet. at 20-22. The possible availability of a future proceeding in which the taxpayer may make a suppression motion is simply irrelevant to the present mootness inquiry. And because of the ready availability of effective relief, *see Sells, supra; Gluck, supra,* nothing in the mootness analysis turns on whether the government has already obtained the documents from the disinterested third party.

III. The government contends that petitioner's arguments on the underlying merits of its appeal to the court below are "demonstrably erroneous." Opp. at 13. The *merits* of an underlying appeal, of course, are irrelevant to the issue of mootness. The Church has addressed the merits of its appeal in a 34-page brief filed with the court below in July 1991; although it can hardly duplicate that discussion here, a brief response to the government's assertion that the issues on

appeal have been finally decided against the Church, Opp. at 13-14, is necessary.

First, the district court originally rejected as irrelevant any inquiry into the question whether the government had lawfully obtained the partial transcripts. Pet. at 4. Subsequently, this Court held that the issue was relevant and noted that it remained unresolved. *United States* v. *Zolin*, 491 U.S. 554, 559 n.5, 575 (1989). Although the court below did not address the question, its remand order clearly contemplated that this issue would be raised in the district court. Pet. at 5; Pet. App. 15a & n.2. The district court, however, erroneously ruled that the court of appeals had *sub silentio* foreclosed any inquiry into this issue. Pet. at 6-7; Pet. App. 8a-11a. Thus, *no* court has ever addressed whether the partial transcripts were lawfully obtained.

Second, the question whether there is at present a legitimate purpose for the summons is not foreclosed by prior decisions that the government's previous appeal was not moot. Opp. at 14. Rather, the issue turns on recent admissions by IRS agents that, while the IRS had the partial transcripts in its possession, and while this case was pending in the courts, the IRS had *terminated* the investigation upon which the summons was based. *See United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313-14 (1978); 26 U.S.C. § 7602(a); Pet. at 6.

Third, even assuming that the question whether the district court "should be *required* to review the tapes *in camera* prior to disclosure" has been resolved, Opp. at 14 (emphasis added), that is not the issue presented below. The district court mistakenly ruled that the court of appeals had foreclosed such review. Pet. App. 3a-4a. The Church's appeal asserts that the district court erred in its belief that the court of appeals had removed the district court's *discretion* to review the tapes *in camera*, *see Zolin*, 491 U.S. at 572, particularly

given that no court has reviewed the tapes prior to ordering their release.

In short, the appeal below raises serious, meritorious unresolved issues that should not be foreclosed because of disinterested third party compliance with a summons enforcement order, which can be effectively remedied by the court below should the Church prevail on its appeal.

CONCLUSION

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

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